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Case C-388/95, *Belgium v. Spain*, Full Court, Judgment of 16 May 2000, nyr.

## 1. Introduction

This note concerns a judgment by the Court of Justice on a direct action brought by Belgium against Spain. The Belgian complaint arose as a result of a previous ruling of the Court with which Spain allegedly had failed to comply. The operative part of the earlier judgment read “National provisions applicable to wine of designated origin which limit the quantity of wine that may be exported in bulk but otherwise permit sales of wine in bulk within the region of production constitute measures having equivalent effect to a quantitative restriction on exports which are prohibited by Article 34 [now 29] of the EEC Treaty”.<sup>1</sup> However, Spain failed to modify its legislation so as to comply with the ruling; as a result Belgium brought the matter before the Court. Although the Court found that the rules in question were indeed to be considered as measures having equivalent effect to quantitative restrictions on exports, they were (this time) justified on Article 30 (ex 36) grounds (protection of industrial and commercial property).

## 2. Factual background

The case arose in relation to Spanish legislation providing for the conditions to be satisfied in order for wine to benefit from the “denominación de origen calificada” (denomination of certified origin). According to this legislation, once the denomination is instituted by the Ministry of Agriculture, a regulatory council, mainly composed of representatives of the wine industry, is also created. The regulatory council establishes the rules with which the wines must comply in order to benefit from the denomination, and is in charge of the monitoring of the production, the elaboration and the quality of the wines. In order to benefit from the denomination of certified origin, the law

1. Case C-47/90, *Etablissements Delhaize Frères et Compagnie Le Lion SA v. Promalvin SA and AGE Bodegas Unidas SA*, [1992] ECR I-3669, annotated by Stuyck in 30 CML Rev, 847–860.

provides that the wine be bottled in the region of production. Thus, wine exported in bulk to be bottled in another region or State cannot benefit from the denomination of certified origin.

The Spanish legislation first came to the attention of the Court in 1992: in the *Delhaize* case, a preliminary reference was made by a Belgian court in order to assess the compatibility of the legislation with Article 29 (ex 34) of the Treaty. The Court found the legislation to be discriminatory since no quantitative restriction on the sale of wine in bulk was imposed in the region of production. Thus, since the rules at issue had “the specific effect of restricting exports of wine in bulk, and, in particular, of procuring a special advantage for bottling undertakings situated in the region of production”,<sup>2</sup> they were caught by Article 29. The Spanish Government sought to justify the legislation by invoking the protection of industrial and commercial property derogation provided in Article 30 (ex 36) EC. The Court found that since the function of a registered designation of origin is to “guarantee that the product bearing it comes from a specific geographical area and displays certain particular characteristics”,<sup>3</sup> the requirement that the wine be bottled in the region of production in order to benefit from the denomination would be justified if the bottling in a specific region were to endow the wine with specific characteristics or if it were essential for preserving existing characteristics. The Court then found that that had not been shown in the case at issue and that consequently the rules constituted measures having equivalent effect to quantitative restrictions on exports prohibited by Article 29.

Notwithstanding this very clear ruling, Spain did not take any action to modify its legislation: the Commission refused to bring infringement proceedings against it, even though in the *Delhaize* case it had argued against the Spanish legislation stating that bulk transport posed the same problems for preserving quality irrespective of the distance covered. Accordingly, Belgium brought Article 227 (ex 170) proceedings seeking a declaration that Spain, by not amending its legislation so as to comply with the Court’s ruling in the *Delhaize* case, breached Article 29 and 10 (ex 5) of the Treaty.

Legislation of the type at issue, common in the wine producing States, entails a conspicuous loss of revenues for bottling industries established in non-producer States; this explains the high number of intervening governments: Denmark, the Netherlands, Finland and Britain in support of Belgium; Portugal and Italy in support of Spain.<sup>4</sup>

2. Para 14.

3. Para 17.

4. Belgium, the UK, the Netherlands and Spain had intervened also in the *Delhaize* case.

### 3. Advocate General Saggio's Opinion

The Advocate General found that the part of the *Delhaize* judgment relating to the fact that Spanish legislation was to be considered contrary to Article 29 had to be maintained, given that no factual or legal variation capable of justifying a switch in the Court's orientation had occurred since the judgment. However, in the case of the assessment of a justification under Article 30 (ex 36) some changes had occurred: in the *Delhaize* case the Court had stressed the fact that it had not been shown that the bottling requirement was necessary to endow the wine with specific characteristics or essential to preserve existing ones; in the present case, it had been shown that the transport and bottling process were capable of affecting the quality of the wine.

Having found that bottling in the region was a suitable way of ensuring a quality guarantee, the Advocate General then proceeded to analyse the Spanish allegation that the legislation was aimed at protecting the Rioja wine reputation, and thus the connected right of industrial and commercial property held by the producers of the Rioja region. He pointed out that since the scope of the denomination of origin is not only to indicate the good's place of origin, but also to safeguard the reputation that the good has acquired on the market, the right to the conservation of that reputation is to be considered worthy of protection in the Community legal order. Since the reputation of a product cannot be separated by the notoriety and the prestige of the *distinctive feature* (*signe distinctif*) which constitutes an element of identification of the product on the market, a way to protect the said reputation is to protect the *distinctive feature* of the product. Having referred to *Hoffmann La Roche*<sup>5</sup> and trade mark law, the Advocate General pointed out how the object of the right is also to protect a trader from possible competitors wishing to exploit the position and the *reputation* of the trade mark. In relation to the Belgian submission that labelling would be enough, the Advocate General stated that that would entail the danger of two separate markets, one for the Rioja bottled in the region of production and one for the Rioja bottled elsewhere; this would be inconsistent with the principle of specificity and unity of products which benefit from a denomination of origin.

The Advocate General then concluded that the legislation at issue was justified according to Article 30, since intended to protect industrial and commercial property, and more precisely the right of exclusive use of the denomination of origin *calificada* Rioja together with the connected right to the safeguard of the product's reputation.

5. Case 102/77, *Hoffmann La Roche v. Centrafarm*, [1978] ECR 1139.

#### 4. The Court

The Court substantially follows the Advocate General's Opinion. It found that the rules at issue constituted measures having equivalent effect to quantitative restrictions on exports, since wine bottled in authorized establishments retained the right to use the Rioja denomination of qualified origin, whilst wine bottled abroad would not.

As for the justification, the Court recalled the fact that in the *Delhaize* ruling it had found that it *had not been shown* that bottling in the region of production was an essential condition in order to maintain the specific characteristics of the wine. However, the Court then pointed out that, this time, Spain, Italy, Portugal and the Commission (which had changed its mind since the *Delhaize* case) had submitted new elements to prove that the rule at issue was justified. It then reasoned as follows:

- denominations of origin are part of industrial and commercial property rights;
- denominations may enjoy a great reputation amongst the consumers and constitute a way to gain clients;
- the reputation of the denominations of origin depends on the image that they have amongst the consumers. This image will depend essentially on the peculiar characteristics and generally on the product's quality. It is the quality which constitutes the foundation of the product's reputation.
- the rules at issue are directed at guaranteeing the quality and preservation of these qualities. Thus, they are allowed, provided they satisfy the proportionality and necessity requirements: having found that in ideal conditions the characteristics and the quality of the wine could be maintained even when it had been transported in bulk and bottled outside the region of production, the Court found that these conditions would be more certainly satisfied if the bottling operation were carried out by undertakings established in the region of the beneficiaries of the denomination and operating under their direct control, since these undertakings possess a specific experience and, especially, a deep knowledge of the specificity of the wine characteristics which are to be preserved in the bottling process.

#### 5. Analysis

##### 5.1. *Article 29 and 30*

As a matter of interpretation of Article 29 this judgment only slightly formally expands the scope of application of Article 29, and substantially upholds

previous case law on restrictions of exports;<sup>6</sup> the rules at issue indeed restricted exports of wine in bulk (although indirectly) and were discriminatory in nature. The fact that the wine could not be bottled in other Spanish regions as well as in other Member States is immaterial since the Court consistently held that a rule may be discriminatory even if it also entails discrimination for national producers, or in the case at issue bottling companies.<sup>7</sup> However, the Court somewhat modifies the definition of a measure having an equivalent effect to a restriction on exports.

According to consistent case law, starting with the *J Kaas* judgment, in order to be caught by the Treaty prohibition, the measure was to have as its “specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade *in such a way as to provide particular advantage for national production or for the domestic market of the State in question*”.<sup>8</sup> Notwithstanding the fact that this same formula was used both in the *Delhaize* case and by the Advocate General in the case here analysed, the Court departs from it, in that it does not reproduce the second part of the formula. Should this be confirmed in future case law, a protectionist effect of the restriction is no longer needed; a difference in treatment between export and domestic trade, provided there is a restriction on exports, is now enough to bring the measure within Article 29. This development, recently called for in exactly these terms by Oliver,<sup>9</sup> is to be welcomed: a discriminatory restrictive measure does not cease to be a restriction on exports solely because it does

6. Case 237/82, *J Kaas Bv at al. v. Dutch Government Central Organ Zuivelkontrolle*, [1984] ECR 483; Case C-80/92, *Commission v. Belgium* (radio-communication transmitters), [1994] ECR I-1019; Case C-412/97, *ED Srl v. I Fenocchio*, [1999] ECR I-3845, which extends the doctrine of effect too uncertain and indirect to Art. 29 (para 11).

7. See Case C-21/88, *Du Pont De Nemours Italiana*, [1990] ECR I-889, para 12; Joined Cases C-1 & 176/90, *Aragonesa de Publicidad and Publivia*, [1991] ECR I-4151, para 24; Joined Cases C-277, 318 & 319/91, *Ligur Carni and Others*, [1993] ECR I-6621, para 37; Case C-67/97, *D Bluhme*, [1998] ECR I-8033, para 20; Case C-254/98, *Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH*, Judgment of 13 Jan. 2000, nyr, para 27.

8. *J Kaas* cited *supra* note 6, para 22, emphasis added. This formula differs from the original *Groenveld* formula (case 15/79 [1979] ECR 3409) in that it does not require the measure to be specifically detrimental to trade and/or production in other Member States (“at the expense of the production or of the trade of other Member States” para 7. Cf also Case 155/80, *Oebel*, [1981] ECR 1993, para 15; and Joined Cases 141–143/81, *Holdijk*, [1982] ECR 1299, para 11). The *J Kaas* formula has been used in subsequent cases; see *Delhaize* cited *supra* note 1, para 12; Case C-3/91, *Exportur SA v. LOR SA and Confiserie du Tech*, [1992] ECR I-5529, para 21; Case C-80/92, *Commission v. Belgium* (radio-communication transmitters) cited *supra* note 6, para 24; Case C-158/94, *Commission v. Italy* (electricity), [1997] ECR I-5789, para 25; Case C-159/94, *Commission v. France* (gas and electricity), [1997] ECR I-5815, para 35; *ED Srl v. I Fenocchio*, cited *supra* note 6, para 10.

9. Oliver “Some further reflections on the scope of Articles 28–30 (ex 30–36) EC”, 36 CML Rev., 783–806, at 803. Some Advocates General have called for a broader definition of measure having equivalent effect to a restriction on exports so as to cover also non-discriminatory

not accord an advantage to national trade, and indeed this requirement was never properly examined by the Court.

As far as the interpretation of the Article 30 derogation of protection of industrial and commercial property is concerned, the Court upholds its judgment in *Delhaize*,<sup>10</sup> and elaborates on the reasons which justify the inclusion of the denominations of origin within the Treaty derogation. It establishes the link denominations-reputation-quality drawing on a reasoning similar to the one used for indications of provenance. It then carefully assesses the necessity (but not the proportionality) of the rules at issue and although it finds them not necessary in ideal conditions, it also pragmatically finds that optimum conditions of transport and bottling are more likely to be satisfied when the wine is bottled within the region of production.

### 5.2. *The Delhaize case and Belgium v. Spain*

The most interesting issue however arises not from the interpretation of the Treaty free movement provisions but from the unclear relationship between the *Delhaize* ruling and the case at issue; from a first reading it seems that the Court, without saying it, overruled itself: however a more careful reading of the two judgments does not seem to support this view.

Both in the *Delhaize* case and in the one examined in this note, the Court found the Spanish legislation to constitute a measure having equivalent effect to a restriction on exports. As far as the issue of justification is concerned, in the *Delhaize* case the Court clearly stated that it had not been *shown* that the Spanish legislation was justified according to Article 30; it did not exclude however the possibility of such condition being capable of justification under Article 30, and Article 30 was not mentioned in the operative part of the

restrictions to exports. See A.G. Capotorti's Opinion in *Groenveld*, cited *supra* note 8, paras. 3 and 4, and in *Oebel*, cited *supra* note 8, at 2001; A.G. Gulmann's Opinion in *Delhaize*, cited *supra* note 1, footnote 21. It should be noted however that to so broaden the scope of Art. 29 would mean that product requirements imposed by the country of production would be caught by Art. 29 and would thus have to be justified according to the mandatory requirements or the Treaty derogations. In favour of a broad interpretation of Art. 29, see Roth "Wettbewerb der Mitgliedstaaten oder Wettbewerb der Hersteller? – Plädoyer für eine Neubestimmung des Art. 34 EGV" (1995) ZHR 78, referred to by Oliver, at 802.

10. The *Delhaize* case was in that respect innovative, see Stuyck op. cit. *supra* note 1; the scope of the protection of industrial and commercial property derogation was further broadened in Case C-3/91, *Exportur SA*, cited *supra* note 8, annotated by Brouwer in 30 CML Rev., 1209–1227, which brought within the scope of derogation indications of provenance regardless of whether the products derive a particular flavour from the land or are produced according to standards laid down by a public authority. The Court based its reasoning on the fact that such names may enjoy a high reputation amongst consumers. For an overview on geographical indications see also Schwab, "The Protection of Geographical Indications in the European Economic Community", (1995) EIPR, 242–246.

judgment. In the case here at issue the Court stressed the fact that Spain, the supporting governments and the Commission had efficiently discharged the onus of proof by submitting convincing evidence about the necessity of the restriction.

Thus, as a matter of interpretation of the Treaty provisions the Court has not overruled itself. However, the striking contrast between the result at which the Court pointed in the *Delhaize* judgment and the result reached in the case analysed here highlights problems relating to preliminary reference proceedings, in which the distinction between interpretation and application of the law to the facts of the case is not always clear.

### 5.3. *The preliminary ruling proceedings – theory and practice*

As is well known, Article 234 grants jurisdiction to the Court to give preliminary rulings on the *interpretation* of the Treaty. It is accepted that Article 234 does not grant the Court jurisdiction over the interpretation of national law, nor does it allow it to *apply* the Treaty, or Community legislation, to the facts of a case.<sup>11</sup> The ECJ has a hermeneutic monopoly over Community legislation: in Article 234 proceedings its function is both to assert this monopoly (thus the mandatory reference in cases pending before courts of last instance) and to ensure the uniform application of Community law within the Member States.<sup>12</sup> However, since its jurisdiction is limited to the interpretation of Community law, and since it cannot “know” national legislation, it can neither declare the national provision invalid because incompatible with Community law, nor decide the case on its facts.<sup>13</sup> This is further highlighted by the structure of preliminary references: the proceeding is non-contentious (there is no defence reply nor rejoinder); the parties to the main proceeding do not necessarily disagree as to the favoured interpretation of Community law (indeed they agreed in the *Delhaize* case); the burden of proof is limited to what has been termed a “tactical” burden of proof.<sup>14</sup> Because of the non-contentious nature of the proceedings the Member States are under no duty to submit

11. Constant case law since Case 6/64, *Costa v. Enel*, [1964] ECR 585 in which the Court stated that Art. 234 “gives the court no jurisdiction either to apply the Treaty to a specific case or to decide upon the validity of a provision of domestic law in relation to the Treaty, as it would be possible for it to do under article 169 [now 226]”.

12. In preliminary rulings, the Court’s function is somewhat similar to the function exercised by the *Cour de Cassation* in France and the *Corte di Cassazione* in Italy, in that also these courts, theoretically, rule only on points of law; on the other hand, in Art. 226 and 227, proceedings the Court’s function is somewhat similar to the traditional function of Constitutional courts.

13. See, in relation to this, the interesting note on Case C-6/99, *Association Greenpeace France and Others v. Ministère de l’Agriculture et de la Pêche and Others*, judgment of 21 March 2000, nyr, by Gaja, 37 CML Rev., 000–000.

14. Brealey, “The burden of proof before the European Court”, (1985) EL Rev., 250.



observations or to discharge any evidence,<sup>15</sup> although they often do so when the reference arises from a court in their territory.<sup>16</sup> On the other hand the Commission and the Member States, be they defendants or plaintiffs, are under a duty to discharge the onus of proof in contentious proceedings.

The relationship between the *Delhaize* ruling and *Belgium v. Spain* may thus be understood as a misapplication of the principles relating to non-contentious proceedings. The Court in *Delhaize* did acknowledge that the condition could be justified according to Article 30 protection of industrial property derogation, and indeed this was the innovative part of the ruling. However, it then added that in the case at issue it *had not been shown* that the bottling requirement was necessary to achieve the purposed aim.<sup>17</sup> However, as said above, in Article 234 proceedings there is no burden of proof: it is not clear then who, in the Court's opinion, had failed to show that the condition was necessary to endow the wine with particular characteristics.<sup>18</sup> This is even more so given that from the report for the hearing of the *Delhaize* case, it seems that Spain was more concerned with pleading that denomination of origin fell within protection of industrial and commercial property, than with the assessment of the necessity of the measure.<sup>19</sup> It is hardly surprising then that in *Belgium v. Spain*, a direct action in which the parties were under a duty to discharge the onus of proof, the Court was in a better position to assess the necessity of the measure at issue.

## 6. Conclusions

As said above, as a matter of theory in *Delhaize* the Court should have left the assessment of the necessity of the Spanish legislation to the referring court;<sup>20</sup> if it had done so it would have avoided the embarrassment of ruling differ-

15. For instance in Case 52/77, *Cayrol v. Rivoira*, [1977] ECR 2261, although the compatibility of French legislation was at issue in an Italian Court which made a reference to the ECJ, France did not intervene in the proceedings.

16. Often, but by no means always. See Mortelmans, "Observations in the cases governed by Article 177 of the EEC Treaty: procedure and practice", (1979) CML Rev., 557–591, esp. 573; and more recently de la Mare "Article 177 in Social and Political Context" in Craig and De Burca (Eds.) *The Evolution of EU Law* (Oxford, 1999), pp. 215–261, table 6.5 p. 254.

17. A.G. Gulman similarly pointed out that there had been *no evidence* that there were greater risks if the wine was bottled outside the region (para 37).

18. The Court could have indeed requested the information it needed according to Art. 21 of the Statute of the Court, or an expert opinion according to Art. 22.

19. It should also be recalled that in Art. 234 proceedings, Member States' observations are usually written "in ignorance of the detailed arguments of the other participants", Anderson, *References to the European Court* (London, 1995), esp I-058 et seq.

20. The peculiarity of the judgment is further demonstrated by the fact that, in the operative part of the ruling, the Court departs from its usual formula (legislation such as that at issue is

ently in two identical situations. However, the fact that the Court indicated so “precisely” that the rules were prohibited by Community law could be explained having regard to the fact that the referring court asked elucidation on the compatibility with Community law of legislation of another Member State.<sup>21</sup> In proceedings which involve foreign legislation it is very difficult (and expensive) for the trial judge to assess the proportionality of the legislation. The difficulties are further enhanced when neither party has an interest in the legislation being upheld,<sup>22</sup> and when the proceedings might have been tactically (if not artificially) brought in order to dispose of some national provision.

In the *Delhaize* case the action in the national court was an action for specific performance or alternatively for damages for breach of contract: the damages were provisionally assessed at BFR 1 (!). The Spanish provider, Bodegas, joined as a third party. Bodegas claimed in the national proceedings that the Spanish rules were not incompatible with Article 29, but it did not submit observations in front of the ECJ.<sup>23</sup> The fact that in the *Delhaize* case, Spain was represented in the ECJ proceedings but not in the domestic one, could then partially explain the Court’s willingness to rule directly on the matter, thus leaving no discretion to the Belgian judge to rule on the compatibility of Spanish law with Community law.

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incompatible with Art ... EC Treaty) and declares the national legislation to be *prohibited* by Art. 29.

21. This is not uncommon, especially in cases relating non-performance of a contract due to mandatory national legislation. See e.g. Case 20/64, *Albatros v. Sopéco*, [1965] ECR 29; Case 244/78, *Union Latière Normande v. French Dairy Farmers*, [1979] ECR 2663; Case 261/81, *Rau v. De Smedt*, [1982] ECR 3961; Case C-150/88, *Parfümerie-Fabrik 4711 v. Provide*, [1989] ECR 3891.

22. The Member State whose legislation is contested is not necessarily represented in the national court.

23. It might be wondered whether Bodegas’ submission as to the compatibility of the measure with Community law was not a clever attempt to avoid a possible ruling declining jurisdiction because of the artificiality of proceedings. See Case 104/79, *Foglia v. Novello (no. 1)*, [1980] ECR 745, paras. 10 and 11; and Case 244/80, *Foglia v. Novello (no. 2)*, [1981] ECR 3045, para 18. The suspicion acquires some strength having regard to the fact that after the ECJ ruling the parties transacted and each of them (Bodegas included) met its own expenses.

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